

ANA BATRES

VS.

Respondent

AND

Insurance Carrier

Based upon the evidence presented and for purposes of preliminary hearing, the Appeals Board finds that claimant's injury to her right upper extremity did not arise out of and in the course of her employment with respondent, and the Administrative Law Judge's decision in that regard is reversed.

Claimant suffered accidental injury to her left upper extremity on August 23, 2000, when the handle of a paint hoist fell, striking her left shoulder. Claimant underwent extensive medical treatment through numerous doctors, including Dr. Robert Eyster, Dr. Daryl Thomas and Dr. D. H. Abbas, ultimately coming under the care of Dr. J. Mark Melhorn, an orthopedic surgeon in Wichita, Kansas. Dr. Melhorn began treating claimant conservatively on November 14, 2000. Dr. Melhorn continued treating claimant through July 26, 2001. The medical records from Dr. Melhorn's ongoing conservative care are extensive and will not be repeated herein.

Initially, claimant's left upper extremity, shoulder and neck were treated. Dr. Melhorn diagnosed, at various times, painful wrist, elbow, shoulder and neck, with neuropraxia, possible although doubtful reflex sympathetic dystrophy (RSD), possible Raynaud's and a possible rheumatoid pattern previously noted by Dr. Eyster. The vast majority of the tests performed on claimant were found normal. There was a point when claimant's hands were turning blue. Dr. Melhorn noticed this at one visit, but the symptoms resolved shortly thereafter.

Claimant had pain symptoms in her left upper extremity, ultimately spreading to her right upper extremity, which she described as being from 9½ to 10 in severity on a maximum of 10 scale. Claimant continued working through May 11, 2001. Thereafter, she was off work, but her symptoms did not improve. Every type of treatment provided to claimant, including physical therapy, heat, cool, pain medication and stretching exercises, resulted in claimant's condition worsening rather than improving. Dr. Melhorn ultimately found claimant's etiology to be multifactorial based upon age, genetics, gender, workplace, non-work environment and linked elements.

Claimant was examined at her attorney's request by Dr. Pedro A. Murati on February 5, 2001. Respondent's contention in this matter is that claimant's right upper extremity symptoms are not related to the left upper extremity injury. Dr. Murati sheds no light on this issue as his examination of February 5, 2001, was limited to the left upper extremity and cervical area only. There is no opinion presented by Dr. Murati regarding the cause of claimant's right upper extremity symptoms.

Dr. Melhorn, in his July 27, 2001, letter to respondent's attorney, Kirby A. Vernon, stated that he was "unable to attribute the right upper extremity symptoms to causation from the left or as a result of overuse based on her activities." That is the only causation opinion contained in the record. The Administrative Law Judge in her decision, citing Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976), found Dr. Melhorn's opinion to be outweighed by claimant's testimony, stating that, according to Chinn, the testimony of the claimant may be considered as well as medical evidence in establishing the existence, nature and extent of disability.

While Chinn does use that language, it is noted that, in Chinn, the dispute was not whether claimant's back resulted from the claimant's knee injury. The only medical provider to testify in Chinn, i.e., orthopedic surgeon Dr. Harry B. Overesch, testified that the claimant's back symptoms were related to the altered gait suffered after the claimant injured his knee. The dispute arose due to the fact that Dr. Overesch, at no time, placed a specific diagnosis on the claimant's ongoing back symptoms. The lack of a specific medical term was the dispute in Chinn, rather than the causative aspect of the claimant's back symptoms related to the knee.

In this instance, the only medical opinion relating to causation is that of Dr. Melhorn. Dr. Melhorn is unable to attribute the right upper extremity symptoms to claimant's left upper extremity injury, or her work activities.

Even though the testimony of claimant may be considered, it is still claimant's burden in workers' compensation litigation to prove that her ongoing symptoms and complaints are, in some way, related to her work-related accident. The claimant's testimony regarding her right upper extremity symptoms does not, in this instance, outweigh the medical opinion of a trained orthopedic surgeon, especially in this instance, where the orthopedic surgeon, i.e., Dr. Melhorn, was claimant's treating physician for many months. The Appeals Board, therefore, finds that, based upon the opinion of Dr. Melhorn, claimant has failed to prove her right upper extremity symptoms are related to claimant's left upper extremity injury or to claimant's work activities with respondent. Therefore, the Administrative Law Judge's Order of October 10, 2001, in that regard is reversed and all benefits for the claimed right upper extremity injury are denied.

Respondent further contends that claimant should not be awarded temporary total disability compensation as claimant's temporary total disability compensation was not ordered paid for injuries to the left upper extremity, but rather for those injuries suffered to claimant's right upper extremity.

The Order of the Administrative Law Judge does not specify whether the temporary total disability benefits are being awarded for claimant's right upper extremity or for the work-related injuries suffered to her left upper extremity. In paragraph 13 of the Order, the Administrative Law Judge notes that there is nothing contained in Dr. Melhorn's office notes which indicates that claimant cannot use her right hand. However, it is unclear whether Dr. Melhorn's restrictions relate to the right upper extremity or the left upper extremity or both. The Administrative Law Judge does note that the temporary total disability benefits are being ordered because the employer had no work for claimant to perform within the restrictions provided by Dr. Melhorn, the treating physician.

K.S.A. 44-551 and K.S.A. 44-534a allow for appeals from preliminary hearings when it is alleged that an administrative law judge has exceeded his or her jurisdiction in ordering the benefits requested. Those jurisdictional issues under K.S.A. 44-534a include whether

the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made or whether certain defenses apply.

K.S.A. 44-534a specifically allows an administrative law judge the authority to grant temporary total disability benefits at a preliminary hearing. The Board, therefore, finds that any award of temporary total disability benefits for the injury to claimant's left upper extremity in this instance would not be an issue properly before the Board at this time. As the Board is unable to discern whether the temporary benefits in this matter are being awarded for the injuries suffered to claimant's right upper extremity or the left upper extremity or both, this matter must be remanded to the Administrative Law Judge for a redetermination of the award of temporary total disability compensation consistent with the findings and conclusions contained herein.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes, dated October 10, 2001, should be, and is hereby, reversed with regard to whether claimant suffered accidental injury arising out of and in the course of her employment to her right upper extremity. This matter is remanded to the Administrative Law Judge for additional hearings to determine the basis for the award of temporary total disability compensation.

The Appeals Board does not retain jurisdiction of this matter. Should the parties be aggrieved by any additional decisions of the part of the Administrative Law Judge, the appropriate appeals process must be followed in order to bring the matter again before the Board.

IT IS SO ORDERED.

Dated this ____ day of December, 2001.

BOARD MEMBER

c: Thomas M. Warner, Jr., Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director